IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1211 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KOLI SAVJI BHABHLUBHAI

Appearance:

Mr B D Desai, Addl.PUBLIC PROSECUTOR for Appellant

MR K R Raval with Mr A D SHAH for Respondents No. 1 & 2

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE D.P.BUCH

Date of decision: 27/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

The judgment dated September 9, 1985 rendered by the learned Sessions Judge, Bhavnagar in Sessions Case No.15/1985 acquitting the respondents of the offences punishable under sections 302 and 109 of the Indian Penal Code as well as section 135 of the Bombay Police Act, is the subject matter of challenge in the present appeal which is filed under section 378 of the Criminal Procedure Code, 1973.

2. The incident in question is alleged to have taken place on October 5, 1984 at about 10 p.m. at Ramji Bhagwanbhai's Vadi situated in the sim of village Otha, near Talaja Mahuva Road. Ramji Bhagwanbhai, who is resident of village Ranparda had arranged a programme of devotional songs on the next day of Dussehra and had invited several persons. For this purpose he had erected a Shamiyana and spreaded mattresses. According to the prosecution, the complainant and his deceased brother Ankubha had altercation with respondents no.1 and 2 regarding occupying seat on mattresses. Later on Anukubha got up for urination and when he was crossing Talaja Mahuva road, respondent no.2 gave two to three slaps after referring to the altercation which had taken place earlier. It is the case of the prosecution that the deceased was armed with a club and he hit respondent no.2 with the club on his head as a result of which the respondent no.2 had fallen down. The prosecution has claimed that thereupon respondent no.1 took out a knife from his waist and gave four blows on stomach portion of deceased Ankubha. Because of commotion, several persons had collected at the place where the incident had taken place and, therefore, the respondents had run away. Injured Ankubha was removed to Mahuva Hospital in a S.T. bus and he died during the course of treatment. On receiving necessary intimation from P.S.O. of Mahuva Police Station, P.S.I Mr C A Thakore had gone to the hospital and recorded complaint of Jorubhai Manasurbhai. At the conclusion of investigation, respondent no.3 was charge-sheeted for the offence punishable under sections 302 and 109 of I.P.C. as well as section 135 of Bombay Police Act. As the offence punishable under section 302 of the I.P.C. is exclusively triable by the Court of Sessions, the case was committed to Sessions Court, Bhavnagar for trial where it was numbered as Sessions Case No.115/85. The learned Sessions Judge had framed charge against the respondents of the offence punishable under section 302 read with 109 of I.P.C. as well as

section 135 of Bombay Police Act. The charge was read over and explained to the respondents who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Kishorekumar R Hariyani, PW 1, exh.12, (2) Anantrai Babulal, PW 2, exh.15, (3) Jorubhai Manasurbhai, PW 3, exh.17 (4) Ramjibhai Bhagwanbhai, PW 4, exh.18 (5) Chandrakant P Badheka, PW 5, exh.20 (6) Manji Gabha, P.W.6, exh.22 (7) Manasurbhai Nanabhai, PW 7, exh.23 (8) Bhanabhai Pithabhai, PW 8, exh.24 (9) Karsanbhai Bhagwanbhai, PW 9, exh. 26 (10) Chhatrasinh A Thakore, PW 10, exh.28 and Vrajlal J Patel, PW 11, exh.33 and also produced documentary evidence such as post mortem notes prepared by Dr. Hariyani, complaint of Jorubhai Manasurbhai, discovery panchnamas etc. to prove its case against the respondents. After recording of evidence of prosecution was over, the learned Judge recorded statements of the witnesses under section 313 of the Code of Criminal Procedure. In their further statements, the respondents denied the prosecution case against them. However, they did not examine any witness in support of their defence.

3. On appreciation of evidence, the learned Judge held that it was proved that the death of the deceased is homicidal death. After referring to the evidence of complainant Jorubhai, the contents of complaint as well as evidence of Chhatrasinh Thakore, the learned Judge deduced that the FIR lodged by Jorubhai was got up one and not reliable. The learned Judge, on comparison of evidence of eye witnesses with that of Dr. Hariyani held that the evidence of eye witness was not corroborated by medical evidence and testimony of eye witness was not reliable. In view of the above referred to conclusions, the learned Judge has acquitted the respondents by judgment dated September 9, 1985 giving rise to the present appeal.

4. The acquittal appeal was placed for admission hearing before the Division Bench comprising J P Desai and B S Kapadia, JJ, on March 11, 1986 and following order was passed by the Division Bench:

> "Heard Mr M A Bukhari, learned Addl.Public Prosecutor for the State. The judgment of the learned Sessions Judge shows that there is no iota of evidence so far as the respondents No.3, original accused no.3 Koli Magan Babhlubhai is concerned. Hence there does not seem to be any reason to differ from the learned Judge in appreciation of evidence so far this accused is concerned. Hence, we dismiss the appeal against

respondent no.3, original accused no.3 Koli Magan Babhlubhai.

Appeal admitted against respondents no.1 and 2 i.e. the original accused no.1 and 2. Bailable warrant in the sum of Rs.2000/- against each to be issued.

11.3.1986."

4. From the above quoted order, it is evident that appeal against original respondent no.3 is summarily dismissed and in the present appeal we are called upon to consider the question whether any case is made out by the prosecution against respondents no.1 and 2.

5. Mr B D Desai, learned APP after referring to the entire evidence on record, submitted that the evidence of complainant Jorubhai which is corroborated by contents of his complaint as well as by testimony of Ramjibhai Bhagwanbhai, Manji Gabha and Manasur Nanabhai, proves beyond reasonable doubt that respondent no.2 had caught hold of the deceased whereas respondent no.1 had caused death of deceased Ankubha by inflicting knife blows and, therefore, the appeal against respondents should be accepted. It was claimed that so far as injury by knife on the deceased by respondent no.1 is concerned, the testimony of eye witnesses is consistent and is corroborated by medical evidence and as the witnesses examined by the prosecution are reliable, the case against the respondents ought to have been believed by the learned Judge. According to Mr Desai, learned APP, the witness being related to the deceased would not allow the real culprits to go scot-free or involve innocent persons falsely in a serious case and, therefore their evidence should be accepted by the court. The learned Counsel emphasised that the learned Judge has committed manifest error in appreciating the evidence on record and, therefore, the appeal should be allowed.

6. Mr K R Raval, learned Counsel appearing for the respondents contended that the prosecution witnesses have not stated a word against respondent no.3 i.e. Koli Magan Babhlubhai and as witnesses have a tendency to implicate innocent person falsely in a serious case of murder, their testimony should be discarded. The learned Counsel pointed out that the evidence of eye witness does not stand corroborated by medical evidence which means that the witnesses had not seen the incident and, therefore, no error was committed by the learned Sessions Judge in disbelieving the witnesses. The learned Counsel for the defence pleaded that the evidence of PSI

Chhatrasinh Thakore makes it evident that a serious attempt was made to fabricate complaint against the respondents and, therefore, the learned Judge who had advantage of observing demeanour of the witnesses cannot be said to have committed any error in disbelieving the prosecution case. The learned counsel emphasised that the view of the learned Sessions Judge while acquitting the respondents cannot be said to be not reasonably possible and, therefore, even if this court comes to the conclusion that another view is possible, the acquittal of the respondents should not be reversed.

7. We have heard the learned Counsel for the parties and taken into consideration the evidence on record. Complainant Jorubhai, PW 3, exh.17 has claimed in his testimony before the court that he had seen respondent no.1 inflicting knife blows on the deceased, and that the deceased was removed to Mahuva hospital in a S.T. bus, where his complaint was recorded by PSI Chhatrasinh A Thakore. Witness Chhatrasinh Thakore in his evidence, has clearly stated that after recording of complaint was over, the deceased had expired but the complaint of Jorubhai which is produced on record of the case at Mark 'A' indicates that in the complaint it was stated that the deceased had expired. Witness Chhatrasinh Thakore in cross-examination by the defence witness, has in no uncertain terms stated that in the complaint of witness Jorubhai which he had recorded, it was never mentioned that Ankubha had expired. Thus the evidence of witness Chhatrasingh Thakore makes it clear that complaint Mark 'A' is a got up document and cannot be relied upon at all. The evidence of P.S.I. Chhatrasinh indicates that a new complaint was drafted out and substituted for original complaint which is not forthcoming at all. Moreover, the evidence of Jorubhai does not get support from medical evidence. The witness claimed in his deposition that when the deceased was assaulted, he was in a standing posture and after receipt of blows he had fallen down. However, Dr. Hariyani in his cross-examination, has clearly stated that injury no.1 found on deceased could not have been caused while the deceased was in a standing posture. Moreover, after looking to the Muddamal, article no.3 which is a knife and which according to the prosecution was discovered at the instance of respondent no.2, the Doctor has stated before the court that the injuries found on the deceased were not possible by the said knife. Witness Jorubhai has stated in his evidence that at the time when deceased was removed to Mahuva hospital, he was alive and was able to speak. However, curiously enough, Chhatrasinh Thakore, PSI of Mahuva Police Station who had gone to the

Hospital, had not tried to know the version of the incident from the deceased. Witness Jorubhai has claimed that his brother, after admission to hospital, was treated for half an hour but nothing has been produced by the prosecution on record of the case to indicate as to who had treated the deceased for half an hour or that which treatment was meted out to him. The cross-examination of witness Jorubhai makes it evident that in fact he had not witnessed the incident and had gone to the place where the incident had place after it was over. In our view, therefore, the learned Judge did not commit any error in not placing any reliance on the sworn testimony of witness Jorubhai. Similarly, evidence of witnesses Ramjibhai Bhagwanbhai, Manji Gabha, Manasur Nanabhai stand contradicted by medical evidence and it is obvious that they had no occasion to witness the incident. The conduct of witness Ramjibhai Bhagwanbhai is not free from doubt because he has stated before the court that though he had heard the commotion, he had not gone to the place of incident but was seeing the incident from a distance. Similarly the evidence of witness Manji Gabha is also not free from doubt and is unreliable. This witness in cross-examination has stated that at the time when the incident took place, he was busy in kitchen in preparing food and had come out only after the respondents had run away. Thus, this witness himself has disproved his claim made in his examination-in-chief that he had witnessed the incident. So also we do not find that the evidence of witness Manasur Nanabhai is reliable In fact, on hearing that P.S.I was to visit the village, he had made himself scarce and his statement was recorded next day of the day of the incident. Though this witness claimed in his examination-in-chief that he had seen the incident, it is relevant to notice that he had neither raised shouts nor attempted to save the deceased nor had told any one about the incident in question. On overall view of the evidence, we are satisfied that the learned Sessions Judge who had advantage of observing the demeanour of the witnesses, has rightly disbelieved the prosecution case and acquitted the respondents.

8. This is an acquittal appeal in which the court would be slow in interfering with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had an opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to

reiterate the evidence of prosecution witnesses in detail or to restate the reasons for acquittal given by the trial court and in our view, the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts and circumstances of the present case. This is so in view of the decisions rendered by the Supreme Court in the case of State of Karnataka v. Hema Reddy & Anr. reported in AIR 1991 SC 1417 and (2) in the case of Girijanandini v Bijendra Narain, reported in AIR 1967 SC 1124. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned APP has failed to dislodge the reasons given by the learned Judge in order to convince us to take a view contrary to the one already taken by the learned Judge.

9. The net result of the above discussion is that we do not see any merit in the appeal and the appeal is liable to be dismissed. The appeal, therefore, fails and is dismissed. The muddamal article to be disposed of in terms of the directions given by the Learned Judge in the impugned judgment.

27.3.2001 [J M Panchal, J.]

[D P Buch, J.]

msp.